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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1144

KENNETH G. LAWRENCE, M.D., ELIZABETH REED, AND EDWARD REED, PETITIONERS,

versus

STATE OF SOUTH CAROLINA, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of South Carolina is reported at 212 S. E. (2d) 52 (1974) and is set out in Appendix of Petition.

JURISDICTION

Respondent does not question the Court's jurisdiction in the proceeding.

QUESTION PRESENTED

Did the Trial Court and Supreme Court of South Carolina violate Petitioners' rights under the Fourth and Fifth Amendments to the United States Constitution by ruling that certain documentary evidence seized under a valid search warrant were admissible into evidence at Petitioners' trial?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent statutes and constitutional provisions are set out in Petition.

STATEMENT

Petitioners were arrested in September, 1973, and were indicted at the October, 1973, term of the Court of General Sessions for Florence County, South Carolina, on charges of conspiring to furnish false or fraudulent information in the writing of medical prescriptions in order to gain the possession of a controlled substance, namely amphetamine, by their misrepresentation, fraud, forgery, deception, and subterfuge, all being in violation of Section 32-1510.51 of the 1962 Code of Laws of South Carolina, as amended.

The conspiracy first surfaced on Sunday, August 12, 1973, when Petitioners Elizabeth and Edward Reed at separate times during the day presented five medical prescriptions for filling to Dr. Richard D. Shuler, a pharmacist at Revco in Florence, South Carolina. Dr. Shuler testified at the trial that his suspicions were aroused by the unusually large dosage, number, and quantity (100 capsules, 20 mg., one three times a day) of the prescriptions presented to him. (T.R. p. 68, f. 272; p. 72, f. 287.)[1] His subsequent telephone calls to the two individuals named on the prescriptions presented first by Mrs. Reed confirmed his suspicions (T.R. p. 73, f. 290), and he contacted the appropriate narcotics officials (T.R. p. 74, f. 294), who initiated the investigation which ultimately produced the sixteen count indictment against the Petitioners. Arrest warrants were subsequently issued and served on the Petitioners in September, 1973.

Dr. Lawrence's office was searched at the time of his arrest on September 19, 1973, under authority of a valid

[1] References are to the printed "Transcript of Record".

search warrant for certain files, records, and other papers pertaining to the individuals for whom the Reeds had filled prescriptions on August 12, 1973. (T.R. p. 20.) In reliance upon information as to the existence and location of items further evidencing the conspiracy, which information was received from the former bookkeeper of Dr. Lawrence who had terminated her employment following the disclosure of the conspiracy on September 19, law enforcement officers obtained another search warrant, which was uncontestedly valid, and returned to Dr. Lawrence's office on September 21, 1973, and in a very limited search seized the lists which are the subject of Petitioners' present claim. (T.R. p. 27.)

Parenthetically, it should be observed that the pseudo patient charts contained in Appendix pp. 14(a)-17(a) are mistakenly denominated by both Petitioners and the Supreme Court of South Carolina as having been seized under the authority of the September 21, 1973, search warrant. Those charts, however, were seized under the September 19, 1973, search warrant which was not challenged on appeal. (See T.R. pp. 21-25; pp. 28-40.)

After lengthy pre-trial hearings on their motions to suppress the evidence, which were denied, Petitioners were brought to trial and found guilty by a jury on all counts of the indictment. Petitioners' motions for a Judgment N. O. V. and for a New Trial were also denied. The Petitioners Dr. Lawrence and Elizabeth Reed were sentenced to serve a prison term of one year with three years probation. Petitioner Edward Reed was sentenced to serve a prison term of one year or pay a fine of $2,000.00, and was placed on probation for three years. All Petitioners served timely Notice of Intention to Appeal to the Supreme Court of the State of South Carolina on December 12, 1973.

On appeal error was assigned in this regard only to the Trial Court's denial of Petitioners' motions to sup-

press the evidence seized under authority of the September 21, 1973, search warrant. Their exceptions were based upon the assertion that the specific items seized under that warrant were immune from search and seizure under the interrelated operation of the Fourth and Fifth Amendments to the United States Constitution. The propriety and sufficiency of the search warrants have at no time on appeal been challenged by Petitioners.

ARGUMENT

The Petition for Writ of Certiorari which Petitioners seek is advanced upon a purported conflict among the circuits and state appellate courts regarding the admissibility of documentary evidence taken from an accused's possession under authority of a valid search warrant. Respondent, however, believes that the seizure of evidence of the nature here involved does not fall within the intended scope of the protection of the Fifth Amendment privilege. Moreover, Respondent believes that to accept Petitioners' reasoning would be to expand the coverage of the Fifth Amendment to all papers and evidentiary items which happen to be in the possession of an accused regardless of their nature.

In this case, certain papers were taken from Petitioner Lawrence's office under authority of an admittedly valid search warrant. The papers consisted of lists of "patients" and notes, many on scraps of paper, written by Petitioner Elizabeth Reed, a part-time employee and co-conspirator. Dr. Lawrence in turn made occasional notes thereon indicating dosages and directing other office personnel, not involved in the conspiracy, to record the transactions. However, the "patients" named in Mrs. Reed's lists and for whom Dr. Lawrence issued prescriptions were, in fact, strangers to the transactions, as evidenced by their testimony and the actual prescriptions filed with the pharmacy.

Respondent contends that under the circumstances there was no reasonable expectation of privacy in the lists such as would protect them from lawful search and seizure by the State. *Couch v. United States,* 409 U. S. 322 (1973). As noted, the lists were written by Elizabeth Reed and transmitted to Dr. Lawrence, often through other office personnel. No private communications were involved as evidenced by the fact that Dr. Lawrence directed his office personnel to make other business records of the transactions. Respondent further observes that it was one of Dr. Lawrence's former employees who independently called the existence of the documents to the attention of the authorities. Therefore, Respondent submits that no reasonable expectation of privacy in fact existed in the items which were taken from Dr. Lawrence's possession in that other individuals, in the course of their regular business but who were not involved in the conduct of the conspiracy, had both knowledge of and access to the particular documents seized. Petitioners' claim of privilege, it is respectfully submitted, must therefore be based upon Dr. Lawrence's mere possession of the subject papers. Respondent further submits that the weight of authority and our established notions of the Fifth Amendment privilege do not support Petitioners' position.

It has been said that to compel a Defendant, by subpoena or court order, to produce his private records or papers for use as evidence against him violates his privilege against self-incrimination. *Boyd v. United States,* 116 U. S. 616 (1885). The privilege was subsequently applied to the States in *Malloy v. Hogan,* 378 U. S. 1 (1964). In the principal case relied upon by Petitioners, the Court of Appeals for the Seventh Circuit, one judge dissenting, extended the rule to the records of a taxpayer which had been seized by IRS agents under authority of a valid

search warrant. *Hill v. Philpott,* 445 F. (2d) 144 (7th Cir.), *cert. denied,* 404 U. S. 991 (1971).

Hill involved a search of a doctor's office and home by IRS agents under a very broadly worded search warrant. The "truckload" of books, records, and papers seized were used to gain his conviction for willfully attempted tax evasion, and was the only evidence introduced by the government. The case, Respondent agrees, fairly demanded reversal. However, by their holding the two judges in *Hill,* who are admittedly zealous in tax cases, have apparently attempted to foreclose the lawful seizure of incriminating evidence which a Defendant may happen to have in his possession by discarding the accepted logical distinction between obtaining papers from a Defendant by search and seizure rather than by force of process as "more shadow than substance." *Id.* at 149. They cite in support of that position *Gouled v. United States,* 255 U. S. 298 (1921). However, *Gouled* involved, *inter alia,* a situation where personal papers were taken surreptitiously from the Defendant's office by a government agent and with which he was first confronted at trial. The fruit of the *illegal* search and seizure was ruled inadmissible at trial on both Fourth and Fifth Amendment grounds. *Id.* at 306. The undisputed facts in this case, however, are that the search was lawful in all pertinent respects. The pivotal facts of *Gouled* being distinguishable from the case at hand, as well as the questionable vitality of the case after *Warden v. Hayden,* 387 U. S. 294 (1967), it appears to Respondent that *Gouled* offers little support for the Seventh Circuit's reasoning in *Hill,* and no support whatsoever for these Petitioners' position.

The general understanding of the relationship of the Fourth and Fifth Amendments, as ably expressed in *State v. Bisaccia,* 45 N. J. 504, 213 A. (2d) 185, 187 (1965), is that "[w]hereas the Fifth Amendment forbids the use of any

force whatever to compel a person to testify or to produce evidence of his wrong, the Fourth permits the use of all the strength of government to [reasonably] extract from a man's possession things which will convict him."

In *Warden v. Hayden,* this Court accordingly rejected the common law distinction between "mere evidence" and instrumentalities in favor of making the protection of privacy rather than property rights the principal object of the Fourth Amendment. *Id* .at 304. Recognizing the reality that the government has a countervailing interest in solving crime, this Court reaffirmed in *Warden* the basic proposition of *Schmerber v. California,* 384 U. S. 757 (1966), that "it is reasonable, within the terms of the Fourth Amendment, to conduct otherwise permissible searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals," provided that there be a nexus between the item to be seized and criminal behavior. *Id.* at 306-307. Citing *Johnson v. United States,* 333 U. S. 10, 14 (1947), the *Warden* Court went on to explain that though the demise of the "mere evidence" limitation on lawful search and seizure may enlarge the area of permissible searches, the intrusions may be made only after compliance with the probable cause and particularity requirements of the Fourth Amendment and after the intervention of a "neutral and detached magistrate." 387 U. S. at 309-310.

As noted above, the Petitioners have not challenged on appeal the State's compliance with the Fourth Amendment, but have instead asserted that the documents in Dr. Lawrence's possession were exempt from lawful search and seizure as being violative of their Fifth Amendment privilege against compulsory self-incrimination. This Court in *Warden* expressly declined to decide whether there are items of evidential value whose very nature precludes their being the object of lawful search and seizure. *Id.* at

303. Nevertheless, the Petitioners in this case assume the existence of such a class of items when there is none accepted in law. Consequently, their position, Respondent submits, rests on unfirm ground.

Furthermore, in *Schmerber* it was held "that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, . . ." 384 U. S. at 761.[2] Clearly, some testimonial compulsion must be upon the accused himself to produce the allegedly self-incriminating evidence.

What is a "testimonial compulsion" within the meaning of the privilege, of course, has been the subject of much discussion in the courts and academic circles. The most widely accepted view among the courts and commentators, however, is that of Dean Wigmore as enunciated in his classic work on evidence. 8 *Wigmore, Evidence,* § 2264 (McNaughton rev. 1961). That well-known treatise reasons that the Fifth Amendment privilege does not encompass the seizure and use of evidence where "the proof of [its] identity, or authenticity, or other circumstances affecting them, may and must be made by the testimony of other persons, without any employment of the accused's oath, or testimonial responsibility." *Id.* The generally accepted distinction is that a search warrant does not require the personal affirmation by the accused which is prohibited by the privilege against self-incrimination elucidated by Wigmore. *State v. Griffin,* 129 S. C. 200, 124 S. E. 81 (1924); *United States v. Blank,* 459 F. (2d) 383 (6th Cir.), *cert. denied,* 409 U. S. 887 (1972); *United States v. Bennett,* 409 F. (2d) 888 (2nd Cir. 1969); and generally cases collected 16A Moore's Federal Practice Key No. 393(1), 393(2). While

[2] See 384 U. S. at 761, fn. 5, where the meaning of "testimonial" and "communicative" in Fifth Amendment terms is restricted to "acts on the part of the persons to whom the privilege applies."

expressly refraining from wholly adopting Wigmore's view that the privilege is limited solely to testimonial disclosures "from his lips," the Court in *Schmerber* held, in apparent accord with Wigmore's rationale, that the taking of a blood sample was a "compulsion" but not a "testimonial compulsion" within the scope of the privilege. 384 U. S. at 757-758.

It is respectfully submitted that the removal of papers from an accused's office is no more of a testimonial compulsion than the removal of blood from one's body. After all, it was only after analysis in a laboratory and with the testimony of others that the seizure of blood produced evidence of criminality. *Id.* at 761. Similarly, it was only after analysis in the F.B.I.'s handwriting laboratory and with the testimony of many others that the seizure of the documents here in question evidenced any criminality.

The South Carolina Supreme Court's understanding of the Fifth Amendment privilege, in its interrelated operation with the Fourth Amendment, is in accord with the established notions of the privilege as discussed above. Therefore, it is certain that under the law in South Carolina and in the United States as it relates to the privilege against compelled self-incrimination the Petitioners' claim is untenable and without merit; therefore, it cannot be said that the courts of South Carolina have infringed upon Petions' Fifth Amendment rights.

Finally, Respondent would respectfully direct the Court's attention to the fact that the Petitioners Reed also assert their Fifth Amendment rights against the seizure of the documents in question despite the fact that they were not taken from their possession and, therefore, could not have been obtained through any prohibited governmental compulsion against them. *Couch v. United States, supra.* Nor did they make any showing at any time in the proceedings as to an invasion of their right to privacy in this re-

gard. Therefore, Respondent submits at this time that Petitioners Reed have no standing to object to the seizure and use at their trial of the subject items since no "compulsion" whatsoever was employed by the State against them in violation of their Fifth Amendment rights.

CONCLUSION

The Petition urges in very sophisticated argument that the seizure and admission into evidence at trial of the documents in question served to violate the Petitioners' rights under the Fourth and Fifth Amendments. As demonstrated in reply, however, it is clear on the applicable law and facts of this case that the papers seized were neither "private writings" nor "compelled testimony" within the meaning of the asserted privilege. Consequently, Respondent submits that the Supreme Court of South Carolina was entirely correct in finding no merit in Petitioners' Fourth and Fifth Amendment claims.

Therefore, for all of the foregoing reasons, Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL R. McLEOD,
Attorney General,

C. TOLBERT GOOLSBY, JR.,
Deputy Attorney General,

RICHARD P. WILSON,
Assistant Attorney General.